# ARTICLES

# COMPELLING TESTIMONY IN ALASKA: THE COMING REJECTION OF USE AND DERIVATIVE USE IMMUNITY

JEFFREY M. FELDMAN*
AND STUART A. OLLANIK**

## I. INTRODUCTION

The fifth amendment to the United States Constitution[1] and article I, section 9, of the Alaska Constitution[2] guarantee all persons the privilege against self-incrimination. Invocation of the privilege does not, however, wholly exempt a person from having to provide self-incriminating testimony. It has long been understood that testimony can be compelled if the witness is granted some form of immunity



* B.A., 1972, Northeastern University; J.D., 1975, Northeastern University Law School; Partner, Gilmore & Feldman; member, Alaska and Rhode Island Bar Associations; Assistant Public Defender, Alaska Public Defender Agency, 1976-1978; Law Clerk, Alaska Supreme Court, 1975-1976.

** B.A., 1981, George Washington University; J.D., 1984, Georgetown University Law Center; Associate, Gilmore & Feldman; member, Alaska and Missouri Bar Associations; Law Clerk, Alaska Court of Appeals, 1984-1985; Editor, American Criminal Law Review, 1982-84.

1. The fifth amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

2. Article I, section 9, of the Alaska Constitution provides:

> No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

ALASKA CONST. art. I, § 9.

from prosecution.[3] Only the issue of the scope of immunity sufficient to compel testimony over a claim of the privilege against self-incrimination remains unsettled. Although the federal courts,[4] Congress,[5] state courts,[6] and state legislatures[7] have grappled with the issue of the proper scope of immunity for nearly two centuries, controversy over this important constitutional question persists.

Two different general means of compelling testimony by immunizing witnesses from prosecution are currently utilized: (1) transactional immunity and (2) use and derivative use immunity.[8] Transactional immunity absolutely precludes prosecution of a witness for crimes referred to in the compelled testimony.[9] In contrast, use and derivative use immunity prohibits only the use of the compelled testimony and all evidence derived therefrom in future criminal proceedings against the witness.[10] Thus, use and derivative use immunity permits prosecution of the witness for crimes referred to in the com-

---

3. *See infra* sections III & IV.

4. *See, e.g.,* Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

5. *See, e.g.,* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 926, 927 (codified as amended at 18 U.S.C. § 6002 (1982)); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 216, *repealed by* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 227(a), 84 Stat. 930; Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), (c), 92 Stat. 1466; Act of Feb. 25, 1868, ch. 13, 15 Stat. 37 (declared unconstitutional in *Counselman,* 142 U.S. 547 (1892)); Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, *amended by* Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (indirectly declared unconstitutional as in *Counselman,* 142 U.S. 547 (1892)).

6. *See, e.g.,* State v. Miyasaki, 62 Haw. 269, 614 P.2d 915 (1980); Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982); State v. Soriano, 68 Or. App. 642, 684 P.2d 1220, *aff'd,* 298 Or. 392, 693 P.2d 26 (1984).

7. *See, e.g.,* ALASKA STAT. § 12.50.101 (1984); HAW. REV. STAT. § 621C (Supp. 1984); OR. REV. STAT. §§ 136.617, 136.619 (1981) (repealed 1983).

8. In the nineteenth century, a third form of immunity, namely use immunity, was recognized. Use immunity precludes only the actual use of compelled testimony. *See* Kastigar v. United States, 406 U.S. 441, 449-50 (1972). Under a grant of use immunity, evidence derived from the compelled testimony may be used in a subsequent prosecution against the witness. *See id.* This form of immunity was declared unconstitutional in 1892. Counselman v. Hitchcock, 142 U.S. 547 (1892); *see infra* notes 46-49 and accompanying text. Since that time it has been clearly understood that mere use immunity is insufficient to compel testimony over a claim of the privilege against self-incrimination. In light of the fact that present-day courts regard this form of immunity as per se unconstitutional, this article does not treat use immunity as a viable means of compelling testimony.

9. Kastigar v. United States, 406 U.S. 441, 453 (1972). In order to qualify for immunity, the testimony must be given in response to a question rather than volunteered in an effort to frustrate and prevent prosecution. Surina v. Buckalew, 629 P.2d 969, 971-72 (Alaska 1981).

10. *Surina,* 629 P.2d at 971 n.2.

pelled testimony if the prosecution is based entirely on independently obtained evidence.[11]

Until 1972, when the Supreme Court upheld a federal use and derivative use immunity statute in *Kastigar v. United States,*[12] virtually every court that considered the issue of the compulsion of testimony favored transactional immunity.[13] It appears that most courts interpreted the Supreme Court's 1892 decision in *Counselman v. Hitchcock*[14] as finding only transactional immunity constitutional. Since *Kastigar,* the Alaska Supreme Court has had several opportunities to take sides in the debate over the grant of immunity constitutionally required to compel testimony. On each such occasion, the court has expressed a preference for transactional immunity, but has carefully avoided resolving the issue on constitutional grounds.[15]

Despite the expressed preference of the Alaska Supreme Court, the Alaska legislature has enacted a standard use and derivative use

---

11. *Id.*

12. 406 U.S. 441, 448. The current version of the statute upheld is found at 18 U.S.C. § 6002 (1982) and reads:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or other information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

13. *See, e.g.,* United States v. Cropper, 454 F.2d 215 (5th Cir. 1971) (only transactional immunity provides adequate constitutional basis for compelling appellant to testify in light of fifth amendment privilege against self-incrimination), *rev'd,* 406 U.S. 952 (1972); United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971) (transactional immunity is constitutionally required as to the questioning sovereign), *cert. denied,* 405 U.S. 992 (1972); *In re* Korman, 449 F.2d 32 (7th Cir. 1971) (once fifth amendment privilege against self-incrimination asserted, transactional immunity must be accorded before grand jury witness can be compelled to testify), *rev'd,* 406 U.S. 952 (1972); United States *ex rel.* Catena v. Elias, 449 F.2d 40 (3d Cir. 1970) (use immunity is not sufficiently comprehensive to justify use of coercive measure in order to compel appellant to testify after he had claimed his constitutional privilege against self-incrimination), *rev'd,* 406 U.S. 952 (1972); *In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971) (transactional immunity is constitutionally mandated when testimony is compelled). *See also In re* Reynolds, 449 F.2d 1347 (9th Cir. 1971) (court ordered full transactional immunity for Reynolds after she asserted her fifth amendment right against self-incrimination), *cert. denied,* 408 U.S. 924 (1972); *In re* Vericker, 446 F.2d 244 (2d Cir. 1971) (granting transactional immunity). *But see In re* Desaulnier, 360 Mass. 769, 279 N.E.2d 287 (1971) (denying right to transactional immunity).

14. 142 U.S. 547 (1892); *see infra* notes 46-49 and accompanying text.

15. *See infra* section IV(B).

immunity statute at the behest of the Alaska Department of Law.[16] This article considers the Alaska Supreme Court's voice in the constitutional dialogue on witness immunity and concludes that the court will likely hold Alaska's new use and derivative use immunity statute unconstitutional under article I, section 9, of the Alaska Constitution.[17] A contrary result would be inconsistent with the history of the privilege against self-incrimination, the conceptualization of the privilege that existed in the minds of the framers of the Alaska Constitution, and the judicial policies that provided the analytical basis for a number of important Alaska Supreme Court decisions.

Section II of this article analyzes the historical development of the privilege against self-incrimination. Section III reviews the history and development of testimonial immunity on the federal level. Section IV examines the development of the law of immunity in Alaska. Finally, Section V advances the argument that the Alaska use and derivative use immunity statute should be struck as contrary to the Alaska Constitution.

## II. DEVELOPMENT OF THE MODERN PRIVILEGE AGAINST SELF-INCRIMINATION

The notion of a privilege against self-incrimination is of ancient origin.[18] References to it may be found in Biblical literature and Talmudic law. For example, the Talmud contains the rule "ein adam meissim atsmo rasha," which translated literally means "a man cannot represent himself as guilty, or as a transgressor," or figuratively, "no one can incriminate himself."[19] Notably, the rule was absolute — it could not be waived or relinquished.[20]

The modern formulation of the privilege emerged as a rejection of the oath *ex officio,* which was an inquisitorial oath used by the English ecclesiastical courts, the Court of the Star Chamber, and the High Commission to force individuals to accuse themselves under penalty of

16. ALASKA STAT. § 12.50.101 (1984).

17. Three other states have rejected similar statutes on state constitutional grounds. *See* State v. Miyasaki, 62 Haw. 269, 614 P.2d 915 (1980) (declaring unconstitutional HAW. REV. STAT. § 621C (Supp. 1984)); Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982) (declaring that MASS. ANN. LAWS ch. 93A, § 6(7) (Law. Co-op. 1985) was not coextensive with the state privilege against self-incrimination because it failed to provide for transactional immunity); State v. Soriano, 68 Or. App. 642, 684 P.2d 1220 (1984) (declaring unconstitutional OR. REV. STAT. § 136.619 (1981) (repealed 1983)).

18. *See* THE BABYLONIAN TALMUD, (I. Epstein, ed., Soncino Edition 1935); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); Horowitz, *The Privilege Against Self-Incrimination: How Did it Originate?,* 31 TEMP. L.Q. 121 (1958).

19. THE BABYLONIAN TALMUD, *supra* note 18, at Sanhedrin 96; L. LEVY, *supra* note 18, at 434; Horowitz, *supra* note 18, at 125-27.

20. L. LEVY, *supra* note 18, at 434.

contempt or perjury.[21] By the end of the seventeenth century, the privilege against self-incrimination was firmly established as a rule of evidence in English common law courts.[22] Basically, the privilege was intended to make the administration of criminal justice more humane.[23] The establishment of the privilege reflected the precepts that society benefits by obtaining convictions without the aid of involuntary admissions,[24] that an accused is innocent until proven guilty, that the burden of proof justifiably rests on the prosecution, and that a person's home should not be forcefully entered and searched for evidence of his reading and writing.[25] In sum, the privilege grew out of the belief that any cruelty or coercion, however subtle, in forcing a person to expose his own thoughts and guilts was unfair and illegal.[26]

One of the instrumental events in the evolution of the privilege against self-incrimination occurred late in 1637 when marshals of the English High Commission arrested "Freeborn John" Lilburne, a young Puritan, on charges of shipping seditious books into England from Holland.[27] Lilburne denied the charge and refused to answer questions that he feared could provide the basis for other charges against him. After Lilburne spent nearly two weeks in jail, the King's attorney summoned Lilburne to the Court of Star Chamber and demanded that he take the oath *ex officio.* Lilburne refused. When presented with a Bible and told to swear, Lilburne responded:

> "To what?"
>
> "That you shall make true answer to all things that are asked of you."
>
> "Must I so sir? But before I swear, I will know to what I must swear?"
>
> "As soon as you have sworn, you shall, but not before."[28]

Lilburne persisted in his refusal to take the oath, fearing that the court aimed "to make [him] betray [his] own innocency, that so they might ground the bill upon [his] own words,"[29] and was returned to prison.

---

21. *Id.* at 44-53.

22. Horowitz, *supra* note 18, at 123.

23. *Id.* at 142.

24. *Id.* at 141-42.

25. *See* L. LEVY, *supra* note 18, at 430-32.

26. *Id.* at 431-32; Fortas, *The Fifth Amendment: Nemo Tenatur Prodere Seipsum,* 25 CLEV. B.A.J. 91, 97-99 (1954).

27. Lilburne was a political activist who made civil disobedience a way of life. He was a political pamphleteer, leader of the Levellers (a Puritan reformation group) and the catalytic agent in the history of the right against self-incrimination. *See* M. GIBB, JOHN LILBURNE, THE LEVELLER: A CHRISTIAN DEMOCRAT (1947); L. LEVY, *supra* note 18, at 273 n.9.

28. Trial of John Lilburne and John Warton, How. St. Tr., III, 1315, 1318 (1637) (account written by Lilburne, cited in L. LEVY, *supra* note 18, at 275).

29. *Id.* at 1320.

Approximately two months later, the Court of Star Chamber resummoned Lilburne and told him to take the oath. He again rebuffed the court and was found in contempt. Lilburne's sentence included a fine, punishment in the pillory, and imprisonment for the period of noncompliance. In addition, he was whipped through the streets en route from Fleet Prison to the pillory.[30]

Lilburne's case attracted wide attention and public sympathy. Others soon began to refuse to take the oath *ex officio* despite the demands of the Court of Star Chamber.[31] Finally, after two years of Puritan insurrection and civil disobedience, the King of England, Charles I, reluctantly accepted a Parliamentary statute that abolished the courts of the High Commission and the Star Chamber and, with them, the repugnant oath *ex officio.*[32]

No constitutional documents incorporating a privilege against self-accusation emerged in England from the Puritan revolution. When Parliament enacted the English Bill of Rights in 1689, England still lacked such a document. By that time, however, "the privilege had become so well established and universally recognized that to have inserted it would have been very much like re-affirming the law of gravitation."[33]

The American colonists maintained the ideals of Lilburne and his followers who fought for the abolition of the Court of Star Chamber and the oath *ex officio.*[34] Although inquisitional examinations occurred in the colonies, they were often the subject of bitter protest.[35]

---

30. Although he was almost beaten to death, Lilburne put on a spirited show of defiance. From the pillory, Lilburne spoke to the gathered crowd explaining his refusal to take the inquisition oath. When he refused to be silenced, Lilburne was gagged. Based upon a report of Lilburne's conduct by the warden of Fleet, the Star Chamber issued a new order punishing Lilburne for his behavior on the pillory. He was ordered to be "laid alone with irons on his hands and legs" in the part of the prison "where the basest and meanest sort" were kept. He was denied visitors, books, and writing materials. There, they kept him in a dungeon chained and without a bed for five weeks, starving him for the first ten days. *See* L. LEVY, *supra* note 18, at 277; *see also* M. GIBB, *supra* note 27, at 45-56; Wolfram, *John Lilburne: Democracy's Pillar of Fire,* 3 SYRACUSE L. REV. 213 (1952).

Eventually Lilburne carried his complaint to the "Long Parliament" which vacated the sentence and granted him a large sum in reparation. *See* Fortas, *supra* note 26, at 96-97. For a more complete discussion of Lilburne's plight, see Wolfram, *supra* note 30.

31. *See* L. LEVY, *supra* note 18, at 278; *see also* Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England,* in ESSAYS IN HISTORY AND POLITICAL THEORY 199 (C. Wittke ed. 1936).

32. *See* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763, 772 (1935).

33. *Id.* at 774.

34. *See id.* at 769.

35. *Id.*; *see also* L. LEVY, *supra* note 18, at 368-404 (Levy notes that the right

By the end of the eighteenth Century, the privilege had been firmly embraced by the American colonies[36] and made a part of the fifth amendment to the United States Constitution. Since that time, the United States Supreme Court has frequently recognized the importance of the privilege against self-accusation and the fundamental values that it protects.[37] In *Murphy v. Waterfront Commission,*[38] the privilege was described as "an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.' "[39]

## III. HISTORY AND DEVELOPMENT OF TESTIMONIAL IMMUNITY

Until 1857, the fifth amendment's protection against self-incrimination was absolute; no means existed to compel a witness to provide self-incriminating testimony. In 1857, however, Congress passed the first federal immunity statute in order to facilitate congressional investigations.[40] Passed with little debate for purposes of political expedience, the statute protected any witness from prosecution regarding "any fact or act touching which he shall [have testified] before either House of Congress or any committee of either House."[41] So worded, the statute provided a virtual "immunity bath" to all witnesses testifying before congressional committees.[42]

---

against self-incrimination was but "shakily" established in 17th century America, but that it was well recognized by the time of independence).

36. By 1789, seven American states had incorporated a privilege against self-incrimination into their constitutions or bills of rights. The seven included: Virginia (June, 1776); Pennsylvania (September, 1776); Maryland (November, 1776); North Carolina (December, 1776); Vermont (July, 1777); Massachusetts (March, 1780); and New Hampshire (March, 1784). POORE'S CONSTITUTIONS AND CHARTERS (1877); *see also* Pittman, *supra* note 32, at 764-65.

37. *See, e.g.,* Ullmann v. United States, 350 U.S. 422, 426 (1956); *see also* Maness v. Meyers, 419 U.S. 449, 461 (1975); Kastigar v. United States, 406 U.S. 441, 445-46 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

38. 378 U.S. 52 (1964).

39. *Id.* at 55 (quoting *Ullmann,* 350 U.S. at 426). Dean Erwin N. Griswold once observed that the emergence of the privilege reflects "an expression of the moral striving of the community" and "an ever present reminder of our belief in the importance of the individual, a symbol of our highest aspirations." E. GRISWOLD, THE FIFTH AMENDMENT TODAY 73, 81 (1955). Interestingly, Griswold, as Solicitor General, later argued on behalf of the United States in *Kastigar.*

40. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155, *amended by* Act of Jan. 24, 1862, ch. 11, 12 Stat. 333 (indirectly declared unconstitutional in Counselman v. Hitchcock, 142 U.S. 547 (1892) (discussed *infra* text accompanying notes 46-49)); *see* Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L.J. 1568, 1571-72 (1963) [hereinafter *Federal Witness Immunity Acts*]; *see generally* Note, *The Scope of Testimonial Immunity Under the Fifth Amendment:* Kastigar v. United States, 6 LOY. L.A.L. REV. 350 (1973).

41. Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

42. Note, *Federal Witness Immunity Acts, supra* note 40, at 1572.

Five years later, Congress radically amended the 1857 statute.[43] As amended, it prohibited only the use of the *actual testimony* before Congress in a subsequent criminal prosecution of the testifying witness. The government remained free to prosecute the witness based on evidence *derived* from his or her congressional testimony.[44] In 1868, Congress enacted a statute similar to the amended version of the congressional investigations provision. This statute created use immunity for all those who testified in a federal "judicial proceeding."[45]

The first challenge to the 1868 "judicial proceeding" provision reached the United States Supreme Court nearly twenty-five years after its enactment in *Counselman v. Hitchcock.*[46] In *Counselman,* the United States Supreme Court found the 1868 federal use immunity statute unconstitutional because it prohibited only the actual use of compelled testimony and permitted the use of evidence derived from that testimony in a subsequent prosecution. The Supreme Court stated that it was "clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."[47]

Although the meaning of the Supreme Court's decision in *Counselman* has been the subject of some dispute, the belief that the Constitution required a grant of transactional immunity to compel the testimony of a witness appears to have been an integral part of the Court's ruling.[48] The Court stated that "[i]n view of the constitutional

---

43. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

44. *Id.*

45. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37 (revised and codified into law in Section 860 of the Revised Statutes of 1878 and declared unconstitutional in *Counselman,* 142 U.S. 547). Section 860 provided:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

46. 142 U.S. 547 (1892).

47. *Id.* at 585.

48. Before *Kastigar,* only a few jurists had questioned the extent to which *Counselman* actually required transactional immunity as a matter of constitutional doctrine. *See* Stevens v. Marks, 383 U.S. 234, 249 (1966) (Harlan, J., joined by Stewart, J., concurring); Murphy v. Waterfront Comm'n, 378 U.S. 52, 106 (1964) (White, J., joined by Stewart, J., concurring); *see also supra* note 13; *cf. Kastigar,* 406 U.S. at 455 n.39. The language of *Counselman* and succeeding cases, however, consistently reflects the view that anything short of transactional immunity would be constitutionally insufficient. *See, e.g.,* Piccirillo v. New York, 400 U.S. 548, 551, 565 (1971) (Douglas and Brennan, JJ., dissenting), *dismissing cert. to* People v. La Bello, 24 N.Y.

provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."[49]

In response to *Counselman,* Congress enacted a transactional immunity statute providing that no person compelled to testify before the Interstate Commerce Commission could be "prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise."[50] Like the use immunity statute in *Counselman,* the new transactional immunity statute was challenged. This time, however, the United States Supreme Court, in the case of *Brown v. Walker,*[51] found that the statute passed constitutional muster.

In *Brown,* the witness argued that *no* immunity law could be constitutional because the fifth amendment absolutely prohibits forced self-incrimination. He contended that, notwithstanding the grant of transactional immunity, he would be exposed to public disgrace by answering questions regarding activities potentially criminal in nature.[52] The Supreme Court upheld the law, stating that an immunity statute need only be coextensive with the protections afforded by the fifth amendment privilege.[53] According to the Court, the statute need not protect one's reputation from injury. The transactional immunity statute upheld in *Brown* was, until 1970, "the basic form for the numerous federal immunity statutes."[54]

---

2d 598, 249 N.E.2d 412 (1969); Brown v. United States, 359 U.S. 41, 45-46 (1959); United States v. Monia, 317 U.S. 424, 428 (1943).

49. 142 U.S. at 586.

50. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, *repealed by* Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), (c), 92 Stat. 1466. Congress apparently read *Counselman* as requiring transactional immunity.

51. 161 U.S. 591 (1896).

52. *Id.* at 593, 606.

53. *Id.* at 605-06. *Brown* was a 5-4 decision. Only a narrow one vote margin allowed even this transactional immunity statute to pass constitutional muster. The dispute within the Court concerning the wisdom of permitting even transactional immunity did not end with the court's decision in *Brown.* Years later, the minority found new voices in Justices Douglas and Black who wrote in favor of overruling *Brown* on the basis of Boyd v. United States, 116 U.S. 616, 635 (1886) ("[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited. . . is compelling him to be a witness against himself, within the fifth amendment to the Constitution . . . ."), and adopted the view of the minority in *Brown* that the right of silence created by the fifth amendment is simply beyond the reach of Congress. Ullmann v. United States, 350 U.S. 422, 440 (1956) (Douglas and Black, JJ., dissenting).

54. Kastigar v. United States, 406 U.S. 441, 452 (1972) (footnote omitted). After the transactional immunity statute was enacted to compel testimony in proceedings before the Interstate Commerce Commission, Congress regularly enacted similar provisions into other regulatory laws. Prior to the statute enacted in 1970, "there were in

In 1956, sixty years after *Brown,* the Supreme Court reviewed a similar transactional immunity statute in *Ullmann v. United States.*[55] Once again, the witness argued that no immunity law could supplant the fifth amendment privilege against self-incrimination. The Court rejected this position and upheld the statute, following its holding in *Brown.*[56]

In 1968, as part of its vigorous focus on crime control, Congress enacted a general transactional immunity statute for federal grand juries and courts.[57] Congress patterned the statute after those reviewed in *Brown* and *Ullmann.* Two years later, however, "after re-examining applicable constitutional principles and the adequacy of existing law,"[58] Congress repealed this transactional immunity statute and passed a use and derivative use immunity statute.[59] This marked the first time that a use immunity scheme had been operative in the United States since 1892 when the Supreme Court declared the 1868 use immunity statute unconstitutional.[60] Thus, seventy-eight years after the Supreme Court held that a grant of use immunity was insufficient to compel testimony over a fifth amendment protest and strongly implied that nothing less than transactional immunity would suffice, Congress extended the power of government to compel a witness to provide potentially self-incriminating testimony.

The inevitable constitutional challenge came two years later, in *Kastigar v. United States.*[61] In *Kastigar,* the petitioners had been subpoenaed to appear before a federal grand jury to testify under the limited grant of use and derivative use immunity conferred pursuant to the new federal law. The petitioners refused to answer upon the ground that "the scope of the immunity provided by the statute was not coextensive with the scope of the [constitutional] privilege against

---

force over 50 federal immunity statutes" mainly based on the initial transactional immunity statute enacted in 1893. *Id.* at 447 (footnote omitted).

55. 350 U.S. 422 (1956) (reviewing the Immunity Act of 1954, ch. 769, 68 Stat. 745 (establishing procedures for compelled testimony before a grand jury or federal court involving interference with or endangering of the national security or defense of the United States) (repealed 1970)).

56. *Ullmann,* 350 U.S. at 439.

57. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 216, *repealed by* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 227(a), 84 Stat. 930.

58. *Kastigar,* 406 U.S. at 452 n.36.

59. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 926-928 (codified as amended at 18 U.S.C. §§ 6001-6005 (1982)).

60. Counselman v. Hitchcock, 142 U.S. 547 (1892).

Both use and derivative use immunity and use immunity may be classified as "use immunity schemes." For differences between the two, see *supra* note 8.

61. 406 U.S. 441 (1972).

self-incrimination."[62] The Supreme Court disagreed and upheld the use and derivative use immunity law.[63] Justice Powell, for the majority, wrote:

> The [fifth amendment] privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[64]

*Kastigar* has been viewed as an unfortunate anomaly in the case law.[65] Subsequent to *Counselman* and *Brown,* court after court restated the view that transactional immunity from prosecution represents the only safeguard coextensive with the privilege against self-incrimination embodied in the fifth amendment.[66] The year prior to the Supreme Court's opinion in *Kastigar,* the United States Court of Appeals for the Third Circuit stated the traditional position on witness immunity:

> [The] record of what the Supreme Court has done and various Justices have said over almost 80 years seem[s] to warrant the conclusion that it has become authoritative constitutional doctrine that no less than a grant of full transactional immunity can justify compelling a witness who has asserted his Fifth Amendment privilege to testify about suspected criminal wrongdoing.[67]

The Supreme Court's dismantling in *Kastigar* of what the Third Circuit viewed as "authoritative constitutional doctrine" was inconsistent

---

62. *Id.* at 442.

63. *Id.* at 462. The majority believed its holding was "consistent with the conceptual basis of *Counselman.*" *Id.* at 453. Justices Douglas and Marshall dissented in separate opinions on the grounds that a grant of use and derivative use immunity is not constitutionally sufficient to compel a witness's testimony. *Id.* at 462-71.

64. *Id.* at 453 (footnote omitted) (emphasis in original).

65. *Kastigar* was characterized by the Hawaii Supreme Court as a "tear in the 'fabric' of the Federal Constitution." State v. Miyasaki, 62 Haw. 269, 282, 614 P.2d 915, 923 (1980); *see also* Note, *District of Columbia Court of Appeals Project on Criminal Procedure,* 28 How. L.J. 1, 88 (1985) (discussing the "judicial indecision" flowing from *Kastigar*).

66. For example, Justice Brennan in dissent in Piccirillo v. New York, 400 U.S. 548, 563 (1971) (dismissing writ of certiorari as improvidently granted), stated that "[m]ere use immunity, which protects the individual only against the actual use of his compelled testimony and its fruits, satisfies neither the language of the Constitution itself nor the values, purposes, and policies that the privilege was historically designed to serve and that it must serve in a free country." *See also* cases cited *supra* note 48.

67. United States *ex rel.* Catena v. Elias, 449 F.2d 40, 43 (3d Cir. 1971), *rev'd,* Elias v. Catena, 406 U.S. 952 (1972).

with the jurisprudential and political history of the privilege against self-incrimination and with over seventy-five years of law developed by the Court itself.

Justice Marshall greeted the majority opinion in *Kastigar* with incredulity, stating that he could not "believe [that] the Fifth Amendment permits [the] result" reached by the majority.[68] In his dissenting opinion, Marshall wrote:

> The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him. A grant of immunity may strip the witness of the right to refuse to testify, but only if it is broad enough to eliminate all possibility that the testimony will in fact operate to incriminate him. It must put him in precisely the same position, *vis-a-vis* the government that has compelled his testimony, as he would have been in had he remained silent in reliance on the privilege.[69]

Even the *Kastigar* majority conceded that any immunity statute, to be constitutional, must leave the witness in substantially the same position as he would have been in had he exercised the privilege against self-incrimination.[70] It then, however, made a largely conclusory leap in finding that the new use and derivative use immunity statute met this requirement by imposing on the prosecution a "heavy burden" of proof on the issue of the independence of the source of any evidence used in a subsequent prosecution against the witness.[71] Justice Marshall, in his dissenting opinion, identified two substantial problems with what have come to be known as *Kastigar* "taint hearings." He wrote:

> First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." . . . For the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness'[s] rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor

68. *Kastigar,* 406 U.S. at 467 (Marshall, J., dissenting).
69. *Id.* at 467-68 (footnote omitted).
70. *Id.* at 458-59.
71. *Id.* at 461-62.

> acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. . . . The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net.[72]

Justice Douglas similarly rejected the majority's decision in *Kastigar.* He rooted his dissent in the language of *Counselman,* which required that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."[73] Justice Douglas, quoting from an earlier dissenting opinion by Justice Brennan, argued that when removing a witness's constitutional privilege, " '[b]oth witness and government [should] know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony.' "[74] Use and derivative use immunity, argued Douglas, does not entirely remove a defendant's suspicions in this regard. "[I]t is futile to expect that a ban on use or derivative use of compelled testimony can be enforced.[75] . . . A witness might believe, with good reason, that his 'immunized' testimony will inevitably lead to a felony conviction."

## IV. Development of the Law of Immunity in Alaska

### A. Early Immunity Statutes

The legislature of the territorial government passed several immunity statutes prior to Alaska statehood in 1959.[76] All of these statutes, including one enacted only four years prior to statehood, required a grant of transactional immunity before permitting the compulsion of testimony over an assertion of the privilege against self-incrimination.

Alaska's first transactional immunity statute was enacted thirty-six years before statehood, and provided for the granting of transactional immunity to witnesses testifying before the Senate, the House of Representatives, or committees of either.[77] In 1951, a transactional immunity statute was passed protecting witnesses compelled to testify

---

72. *Id.* at 469 (Marshall, J., dissenting) (citations omitted).

73. *Id.* at 463 (Douglas, J., dissenting) (quoting Counselman v. Hitchcock, 142 U.S. 547, 586 (1892)).

74. *Id.* at 466 (quoting Piccirillo v. New York, 400 U.S. 548, 568-69 (Brennan, J., dissenting)).

75. *Id.* at 467 n.2 (Douglas, J., dissenting).

76. *See infra* notes 77-79 and accompanying text.

77. 1923 Alaska Sess. Laws, ch. 36, § 7 (codified as ALASKA STAT. § 24.25.070 (1985)). The statute provides:

in matters before the Department of Commerce.[78] Finally, in 1955, the legislature enacted a transactional immunity statute that permitted the Department of Labor to compel testimony over an assertion of the privilege against self-incrimination.[79]

## B. Judicial Development of the Immunity Issue

The Alaska Supreme Court has considered the issue of the level of immunity necessary to compel testimony over an invocation of the privilege against self-incrimination on several occasions. Although the court has not addressed the issue of whether use and derivative use immunity is constitutionally sufficient, it has consistently expressed a strong preference for transactional immunity.

---

(a) A person called as a witness before the senate, house of representatives, or a committee of either or both, who refuses to answer any question or to produce any book, paper or document relating to the matter under inquiry, on the ground that the answer or the production may tend to incriminate the person, may be granted immunity from punishment for the offense to which the question or evidence relates by resolution of the House that is conducting the inquiry. The resolution shall be entered upon its journal, and the witness may then be compelled to answer the question or produce the evidence.

(b) If a witness is granted immunity and compelled to testify or produce evidence after claiming the privilege of self-incrimination, the witness may not thereafter be prosecuted in any court for the offense to which the question or evidence relates.

*Id.*

78. 1951 Alaska Sess. Laws, ch. 129, § 2.104H (codified as ALASKA STAT. § 6.05.020 (1978)). The statute provides in relevant part:

> The department may subpoena witnesses, compel their attendance, require the production of evidence, administer oaths and examine any person under oath in connection with any subject relating to a duty imposed upon or a power vested in the department. These powers shall be enforced by the superior court. An individual who claims privilege against self-incrimination may be compelled to testify, but he shall not be prosecuted or subjected to a penalty or forfeiture on account of anything concerning which he has testified under compulsion, except for perjury commmitted in his testimony.

*Id.*

79. 1955 Alaska Sess. Laws, ch. 5, § 321 (codified as ALASKA STAT. § 23.20.070 (1984)). The statute provides:

> A person may not be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the department, or in obedience to a subpoena of the department in a cause or proceeding before the department, or an appeal tribunal, on the ground that the testimony or evidence required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture. An individual may not be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter, or thing concerning which the individual is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence. However, the individual testifying is not exempt from prosecution and punishment for perjury committed in testifying.

1. McCracken v. Corey. The Alaska Supreme Court first considered the problems associated with immunity in *McCracken v. Corey.*[80] Curiously, *McCracken* did not involve a grant of immunity by either a prosecutor or the legislature. The *McCracken* trial court unilaterally imposed immunity on the defendant.

McCracken, who had previously been convicted of a felony offense, was arrested while on parole and charged with being a felon in possession of a firearm. The alleged offense, if proven, constituted a violation of both Alaska law[81] and the conditions of McCracken's parole. A parole revocation hearing and criminal trial were scheduled, with the parole revocation hearing to precede the criminal trial. McCracken applied for a temporary restraining order and a preliminary injunction staying the revocation proceedings until after the criminal trial. He claimed that the scheduled order of the proceedings would force him to stand mute at the parole revocation hearing in order to preserve his defenses at the criminal trial and avoid self-incrimination. The superior court refused to reverse the order of the two proceedings and ordered that "the [probation revocation] hearing be closed to all persons other than those 'essentially necessary' and that 'any testimony given on behalf of the defense should not be used against the defendant in any way whatsoever. . . .' "[82]

McCracken declined to testify at the revocation proceeding. The parole board found McCracken in violation of the conditions of his release and remanded him to custody to continue serving his original sentence. At his criminal trial four months later, McCracken was acquitted.[83] McCracken filed a petition for writ of habeas corpus claiming denial of due process at the revocation hearing. On appeal, McCracken argued that, despite the immunity bestowed upon him by the superior court, the scheduling of the revocation hearing before the criminal trial forced him to choose between producing evidence at the hearing that might later incriminate him or remaining silent at the hearing and foregoing a valuable defense.[84]

The *McCracken* court examined a number of United States Supreme Court decisions and confirmed the well-established principle that the right to exercise the privilege against compulsory self-incrimination cannot be conditioned upon the forfeiture of another

80. 612 P.2d 990 (Alaska 1980).

81. ALASKA STAT. § 11.55.030 (current version at ALASKA STAT. § 11.61.200-.250 (1983)).

82. 612 P.2d at 991. The superior court's order was essentially a grant of use immunity which did not preclude prosecution of McCracken for the offense with which he was charged or any other matters that were the subject of his testimony before the parole board.

83. *Id.* at 992.

84. *Id.* at 991-92.

constitutionally protected right.[85] The *McCracken* court noted, however, that in other cases involving apparent penalties for the assertion of constitutional rights, the Supreme Court had characterized the choices that defendants faced as tactical decisions and had rejected their constitutional challenges.[86] Thus, the Alaska Supreme Court needed to decide whether the choice forced upon McCracken constituted a penalty for the exercise of the privilege against self-incrimination or if, instead, it merely presented him with a tactical decision.[87]

Like most courts that have confronted this issue, the *McCracken* court declined to address the constitutional question and resolved the problem by invoking the court's inherent supervisory powers.[88] The court held that:

> where a parolee is faced with both revocation and a criminal trial based upon the same conduct, upon timely objection any evidence or testimony presented by the parolee at a revocation hearing is inadmissible by the state in subsequent criminal proceedings. This exclusionary rule applies equally to the fruits of the parolee's prior revocation hearing, "in order to remove completely any illegitimate incentive to schedule revocation hearings in advance of trial."[89]

*McCracken* did not concern the compulsion of immunized testimony. The *McCracken* rule is an exclusionary rule, comparable to the rule of *Simmons v. United States,*[90] which states that a defendant's testimony at a suppression hearing on the issue of standing to object to evidence may not thereafter be admitted against him on the issue of guilt.[91] The *Simmons* court formulated its rule in light of the fact that a suppression hearing must precede the criminal trial to which it re-

85. *Id.* at 993-94 (footnotes omitted). *See, e.g.* Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (impermissible to condition right to hold political party office on agreement to testify before a grand jury and waive immunity); Gardner v. Broderick, 392 U.S. 273 (1968) (police officer improperly fired for refusing to waive immunity and privilege against self-incrimination before grand jury investigating police corruption); Simmons v. United States, 390 U.S. 377, 394 (1968) (defendant's testimony at suppression hearing on issue of standing to object to evidence may not be used against him on the issue of guilt, because it is "intolerable that one constitutional right should have to be surrendered in order to assert another"); Spevack v. Klein, 385 U.S. 511 (1967) (attorney impermissibly disbarred for failure to furnish incriminating records).

86. *McCracken,* 612 P.2d at 994-95. *See* McGautha v. California, 402 U.S. 183, 213 (1971) (approving state procedure of having single trial on issues of guilt and punishment — despite defendant's contention that procedure presented an intolerable tension between due process right to address sentencer and privilege against self-incrimination — since procedure did not "impair to an appreciable extent any of the policies behind the rights involved").

87. 612 P.2d at 994.

88. *Id.* at 998.

89. *Id.* at 998 (quoting People v. Coleman, 13 Cal. 3d 867, 891, 533 P.2d 1024, 1043, 120 Cal. Rptr. 384, 403 (1975)).

90. 390 U.S. 377 (1968).

91. *Id.*

lates and that every defendant who testifies at a suppression hearing cannot be granted transactional immunity. Similarly, the Alaska Supreme Court in *McCracken* recognized that the state's interest in initiating prompt revocation proceedings upon the occurrence of a criminal offense may in some instances justify holding the revocation proceedings before the criminal trial.[92] Because parole revocation proceedings must, at least in some cases, precede the outcome of a criminal trial, use and derivative use immunity represents the most stringent grant of immunity practically available. Due to the narrow holding in *McCracken,* the Alaska Supreme Court's acceptance of use and derivative use exclusion suggests little in regard to the type of immunity required when the state seeks to compel testimony.

Furthermore, the *McCracken* and *Simmons* cases differ sharply from compelled testimony cases in that, though defendants have a constitutional right to testify in both suppression and revocation proceedings, they retain the absolute right to stand silent at such proceedings. This situation is quite different from the nondiscretionary compulsion to testify provided by new immunity statutes.[93] While harm to a defendant may in fact flow from his decision not to testify at a suppression hearing, or even at a probation revocation hearing, he still has other rights on which to rely, most notably the government's burden of affirmatively proving guilt. In contrast, refusal to testify under a statute which allows the compulsion of testimony upon the grant of immunity can subject a witness to imprisonment. A compulsory statute that cuts more drastically into the right against self-incrimination would seem to warrant a greater extension of immunity than that condoned in the non-compulsory settings of *McCracken* and *Simmons.*

2. Surina v. Buckalew. The immunity issue did not lie dormant for long. Within one year the problem arose again, although in a different setting, in the case of *Surina v. Buckalew.*[94] *Surina* presented the question whether, in the absence of an authorizing statute,[95] a

92. 612 P.2d at 999. Chief Justice Rabinowitz, concurring, expressed his opinion that revocation proceedings should always be suspended until after the outcome of related criminal proceedings. *Id.* at 999-1001.

93. While the right to stand silent at a suppression hearing on one's behalf may be a very hollow right, since in many cases the defendant's testimony is the only way of establishing the basis for suppression, a valid distinction is nonetheless made between this kind of incentive to testify and actual compulsion to testify under penalty for contempt of court or contempt of Congress.

94. 629 P.2d 969 (Alaska 1981).

95. In 1980 and 1981, when *Surina* was litigated, the Alaska legislature had not enacted an immunity statute for use in court proceedings. Various immunity statutes had been proposed to the legislature during its previous session but none were enacted. Surina argued on appeal that the absence of enactment of an immunity statute by the

promise of immunity[96] by a state prosecutor and a court may be used to compel testimony from a witness in a criminal proceeding, despite the witness's assertion of the privilege against self-incrimination.[97] The court concluded that, as a matter of Alaska law, "prosecutors in the instant case had the inherent authority, even in the absence of enabling legislation, to grant immunity and to use that grant to compel testimony which would otherwise be protected by the privilege against self-incrimination."[98]

The *Surina* court also discussed the scope of the grant of immunity necessary to compel testimony. The court expressed its view that Rule 732 of the Uniform Rules of Criminal Procedure ("Rule 732"), a transactional immunity provision,[99] provided guidance concerning the

---

legislature was indicative of a legislative intent not to approve such immunity grants. The state argued that an equally reasonable interpretation was that the legislature assumed the prosecutor already had sufficient authority to make such promises without any enabling legislation. The Alaska Supreme Court regarded the "evidence on this point as too nebulous and tenuously connected to support an inference either way." *Id.* at 978 n.20.

96. The witness was promised use and derivative use immunity, as well as at least partial transactional immunity. The scope of the transactional immunity is unclear from the opinion. *Id.* at 970-71.

97. The decision proper did not touch upon the issue of the constitutionality of the scope of the grants of immunity. Indeed, the *Surina* court went to great lengths to make that clear. *See id.* at 973, 979 n.21, 980. Nevertheless, the court did indicate in dicta that transactional immunity is required by the Alaska Constitution. *See infra* text accompanying notes 99-102.

98. 629 P.2d at 979. The court reached this conclusion despite the fact that it found "merit in the position that the decision here [on immunity] should be a legislative one." *Id.* at 978.

Surina also argued that the prosecution could not guarantee that its part of the bargain would be kept (i.e., that the immunity would be efficacious), and that to mandate a waiver of a constitutional right in return for such a "slim promise" was unconscionable. *See* Apodaca v. Viramontes, 53 N.M. 514, 521-22, 212 P.2d 425, 429 (1949). In addition, Surina relied on the case of Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931), which held invalid a joint legislative resolution purporting to grant immunity for testimony before a legislative committee.

99. UNIF. R. CRIM. P. 732, 10 U.L.A. 340 (1974) provides:

> (a) In any proceeding under these Rules, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the [district] court, unless it finds that to do so would not further the administration of justice, shall compel him to answer or produce information if:
>
> (1) The prosecuting attorney makes a written request to the [district] court to order the witness to answer or produce information, notwithstanding his claim of privilege; and
>
> (2) The [district] court informs the witness that by so doing he will receive immunity under subdivision (b).
>
> (b) If, but for this Rule, the witness would have been privileged to withhold the answer or information given, and he complies with an order under subdivision (a) compelling him to answer or produce information, he may not be prosecuted or subjected to criminal penalty in the courts of this

proper scope of an immunity grant.[100] The court noted that it had referred Rule 732 to its Standing Advisory Committee on Criminal Rules for study and recommendation and indicated that in the interim this rule should serve as a guide for grants of immunity. Since the issue had not been raised, the court declined to specifically endorse transactional immunity. The court stated, however, that "the prosecution may make its position unassailable by complying with subsection (b) [requiring transactional immunity]."[101] In summary, the court stated:

> We do note that any immunity grant less than approved in *Kastigar* (use and derivative use immunity) is unconstitutional; and that a grant of transactional immunity on both state and federal levels would clearly suffice to justify compelling the testimony, under any standard. We leave for another day the question of what the Alaska Constitution requires in this respect. And we leave, either to the legislature or to our own determination after the recommendation of the Advisory Commission on Criminal Rules is submitted, the policy question of which option within the constitutional limits is preferable.[102]

3. State v. Serdahely. Within the year, the court was squarely presented with the issue it had refrained from specifically deciding in *Surina*: whether testimony may be compelled upon a grant of use and derivative use immunity. In the cases collectively known as "the *Hohman* case,"[103] the state sought to compel the testimony of one of

---

State for or on account of any transaction or matter concerning which, in compliance with the order, he gave answer or produced information.

(c) A witness granted immunity under this Rule may nevertheless be subjected to criminal penalty for any perjury, false swearing, or contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

100. *Surina,* 629 P.2d at 979 n.21.

101. *Id.*

102. *Id.* at 980. The *Surina* court invited legislative action in two areas in the opinion. In their discussion of whether the prosecution has the authority to make a grant of immunity, the court expressed a "crying need" for appropriate legislation. *Id.* at 978 (quoting *Apodaca,* 53 N.M. at 523, 212 P.2d at 430). The court noted that the decision in *Surina* does not foreclose legislative action on this question. On the separate issue of the scope of the grant of immunity required before testimony can be compelled, the court invited the legislature to address the policy question of whether use and derivative use immunity, or transactional immunity, is preferable. It expressly and necessarily reserved to itself the question of what the Alaska Constitution requires in this respect. *Id.* at 980.

103. Senator George Hohman and three other individuals were charged in bribery and perjury indictments. Senator Hohman was convicted of bribery offenses and Michael DeMan was convicted of perjury. The case against one of the other defendants was dismissed by the state following a grant of immunity to obtain his testimony and the state deferred prosecution of the case against the fourth defendant. *See* court files in State v. Hohman, No. 1JU-81-464 Cr. (Superior Ct. Alaska, 1st Judicial Dist.,

the defendants, Michael DeMan, against the then State Senator, George Hohman, through a grant of use and derivative use immunity.

DeMan had been indicted for perjury in his testimony before the grand jury. The state desired to compel DeMan's testimony, but wished to remain free to prosecute him for the perjury offense. Believing that a conviction against DeMan could be obtained without having to use his actual testimony at the Hohman trial or any evidence derived therefrom, the state offered DeMan use and derivative use immunity.

DeMan objected to the grant of use and derivative use immunity. In a lengthy decision, superior court Judge Douglas J. Serdahely rejected *Kastigar* and ruled that Alaska required transactional immunity.[104] Judge Serdahely found that transactional immunity was required both as a matter of state constitutional doctrine and as a matter of judicial policy in the exercise of the court's supervisory powers.[105] Use and derivative use immunity was, in his opinion, insufficient.[106]

The state appealed Judge Serdahely's decision to the Alaska Court of Appeals. For purposes of expediency, the case, *State v. Serdahely,*[107] was certified directly to the Alaska Supreme Court which affirmed Judge Serdahely's decision requiring transactional immunity. The court did not, however, do so on constitutional grounds. In a short per curiam order with no explanation or analysis, the court, pursuant to its supervisory powers, adopted Rule 732 of the Uniform Rules of Criminal Procedure as "a rule of practice, including subsection (b) relating to the nature and scope of immunity for the reason expressed in the commentary to the rule."[108]

### C. Legislative Response to Serdahely: Adoption of Use and Derivative Use Immunity Statute.

In the year following *Serdahely,* the Alaska legislature enacted a use and derivative use immunity statute at the request of the Alaska Department of Law.[109] The commentary accompanying the bill noted: "The legislature in adopting the approach set forth in this sec-

1981); State v. DeMan, No. 1JU-81-477 Cr. (Superior Ct. Alaska, 1st Judicial Dist., 1981); State v. Kelly, No. 1JU-81-465 Cr. (Superior Ct. Alaska, 1st Judicial Dist., 1981); State v. Larsen, No. 1JU-81-478 Cr. (Superior Ct. Alaska, 1st Judicial Dist., 1981).

104. *DeMan,* No. 1JU-81-477 Cr.; *Hohman,* No. 1JU-81-464 Cr.

105. *DeMan,* No. 1JU-81-477 Cr., at 4.

106. *Id.*

107. 635 P.2d 1182 (Alaska 1981).

108. *Id.*

109. 1982 Sess. Laws, ch. 143, § 23 (codified at ALASKA STAT. § 12.50.101 (1984)). This statute provides:

tion has determined that a requirement of 'use/derivative use' immunity as opposed to 'transactional' immunity is the preferable approach both as a matter of sound public policy and as a matter of constitutional requirement."[110] The legislature knew of the *Serdahely* decision, but for policy reasons preferred a statute granting only use and derivative use immunity.

## V. THE ALASKA USE AND DERIVATIVE USE IMMUNITY STATUTE IS UNCONSTITUTIONAL

The legislative history of Alaska's use and derivative use immunity statute indicates that the legislature has concluded that such provision is constitutionally sound and, for policy reasons, preferable to a rule requiring transactional immunity.[111] The legislature, however, reached faulty conclusions and failed to act within its authority in enacting the statute. The statute is inconsistent with the Alaska Constitution's protection against self-incrimination in that it fails to comport

---

(a) If a witness refuses on the basis of the privilege against self-incrimination to testify or provide other information in a criminal proceeding before or ancillary to a court or grand jury of this state, and a judge issues an order under (b) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. If the witness fully complies with the order, no testimony or other information compelled under the order, or information directly or indirectly derived from that testimony or other information, may be used against the witness in a criminal case, except in a prosecution based on perjury, giving a false statement, or otherwise knowingly providing false information, or hindering prosecution.

(b) In the case of an individual who has been or may be called to testify or provide other information in a criminal proceeding before or ancillary to a court or a grand jury of this state, a superior or district court for the judicial district in which the proceeding is or may be held shall issue, upon the application of the attorney general or the attorney general's designee in accordance with (d) of this section, an order requiring the individual to give testimony or provide other information that the individual refuses to give or provide based on the privilege against self-incrimination.

(c) An order issued under (b) of this section is effective when communicated to the individual specified in the order.

(d) The attorney general or the attorney general's designee may apply for an order under (b) of this section when, in the judgment of the attorney general or the attorney general's designee,

(1) the testimony or other information may be necessary to the administration of criminal justice; and

(2) the individual who is the subject of the application has refused or is likely to refuse to testify or to provide other information on the basis of the privilege against self-incrimination.

(e) As used in this section, "other information" means books, papers, documents, records, recordings, or other similar material.

*Id.*

110. *See* ALASKA HOUSE J. Supp. No. 64, § 23 (June 2, 1982).

111. *Id.*

with the policies underlying the privilege, with prior Alaska Supreme Court decisions interpreting the constitution, and with the intent of the drafters of the constitution.[112] Moreover, the Alaska Constitution relegates to the Alaska Supreme Court primary responsibility for developing rules of procedure.[113] In *State v. Serdahely,*[114] the supreme court exercised its prerogative and adopted both the Uniform Rule of Criminal Procedure 732 and its accompanying commentary. Under the Alaska Constitution, the legislature may change a rule adopted by the supreme court only by following certain specified procedures, and then only by a two-thirds majority vote of each house of the legislature.[115] The legislature failed to fulfill these requirements before enacting the new rule.

### A. The Immunity Statute is Inconsistent with the Alaska Constitution's Protection Against Self-Incrimination

The Alaska Supreme Court should reject the immunity statute as contrary to the protections afforded by the Alaska Constitution for a number of reasons. First, a grant of use and derivative use immunity, as a practical matter, is a wholly inadequate substitute for the privilege against self-incrimination. This type of immunity grant fails to address the lofty principles and policies embodied by the privilege and affords the witness inadequate protection. Second, use and derivative use immunity conflicts with the supreme court's history of broadly interpreting the Alaska Constitution's protections concerning self-incrimination and the right to privacy. Finally, use and derivative use immunity fails to comport with the intent of the drafters of the Alaska Constitution.

1. *Compelling Testimony Pursuant to a Grant of Mere Use and Derivative Use Immunity is Inconsistent with the Policies Underlying the Privilege Against Self-Incrimination.* The premise underlying use and derivative use immunity is that such immunity removes the incriminating nature of testimony. The theory, as explained in *Kastigar v. United States,*[116] is that use and derivative use immunity affords the same protection as the privilege against self-incrimination by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties.[117] In the real-life world of criminal prosecution, however, this premise simply does not hold true.

---

112. *See infra* Section V(A).

113. ALASKA CONST. art. IV, § 15.

114. 635 P.2d 1182 (Alaska 1981), discussed *supra* notes 103-08 and accompanying text.

115. *See infra* notes 196-99 and accompanying text.

116. 406 U.S. 441 (1972).

117. *Id.* at 461.

The practical shortcomings of use and derivative use immunity have been described at length by commentators,[118] and will, therefore, only be summarized here. Basically, the pragmatic approach rests on the belief that, despite the requirement that any evidence used in a subsequent prosecution be derived from an independent source, it is impossible to protect against the nonevidentiary use of compelled testimony adverse to the witness's penal interests. Examples of such nonevidentiary use are discussed below.[119]

*a. Discretionary prosecutorial decisions:* Immunized testimony may disclose the guilt of the witness. This, in turn, may affect the prosecutor's decision on whether to prosecute or plea bargain. It also may cause the prosecution to focus its investigation on the witness to the exclusion of other suspects.[120]

*b. Trial preparation and trial strategy:* Knowledge of any part of a witness's compelled testimony may shed new light on old evidence, helping to explain otherwise known but previously confusing information. It may help the prosecution make the connection between existing evidence and the witness, and disclose the significance of evidence previously thought unimportant. Even a generalized knowledge of the witness's immunized testimony may help a prosecutor anticipate the defendant's defense, thereby aiding the prosecution in its trial strategy. It may affect opening statements and closing arguments, point out avenues of impeachment, and lead to additional questions that might never have been raised absent such knowledge.[121] Finally,

118. *See, e.g.,* UNIF. R. CRIM. P. 732, 10 U.L.A. 340 (1974), commentary at 49-53; Strachan, *Self-Incrimination, Immunity, and Watergate,* 56 TEX. L. REV. 791 (1978).

119. It is interesting to note that all of the common law exceptions to the privilege against self-incrimination involve situations in which no prosecution of the witness is possible. If prosecution is barred by double jeopardy, by pardon, or by the running of the statute of limitations, the witness may be compelled to testify. Never under any common law doctrine has a witness been placed in the position of having to divulge all, when still faced with potential prosecution. State v. Soriano, 68 Or. App. 642, 647, 684 P.2d 1220, 1223-24, *aff'd,* 298 Or. 392, 693 P.2d 25 (1984).

120. Strachan, *supra* note 118, at 807; *see* Reif, *The Grand Jury Witness and Compulsory Testimony Legislation,* 10 AM. CRIM. L. REV. 829, 856-57 (1972); Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 SUP. CT. REV. 103, 165.

121. Strachan, *supra* note 118, at 807-08; *see generally* United States v. Frumento, 552 F.2d 534 (3d Cir. 1977), *cert. denied,* 434 U.S. 1072 (1978); United States v. Housand, 550 F.2d 818 (2d Cir.), *cert. denied,* 451 U.S. 970 (1977); United States v. Tramunti, 500 F.2d 1334 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974); Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198 (1971); Note, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of* Kastigar, 19 VILL. L. REV. 470 (1974).

this advantage may influence a defendant's decision on whether to exercise his right to testify.[122]

*c. Discovery:* The prosecutorial discovery advantage is very similar to that rejected by the Alaska Supreme Court in *Scott v. State.*[123] In *Scott,* the court found that requiring the accused to disclose the names and addresses of witnesses, witness statements, and other evidence relating to an alibi defense, violated the accused's privilege against self-incrimination under the Alaska Constitution.[124]

*d. Identification of independent sources:* Even though the information contained in compelled testimony cannot, consistent with *Kastigar,* be directly used to uncover evidence later submitted against the witness,[125] "it is much more difficult to develop untainted evidence while working toward an unknown end than it is to construct independent sources to support conclusions already [revealed]."[126]

*e. Perjury:* Perhaps the most pernicious problem is that knowledge of immunized testimony may facilitate prosecution of the witness for perjury. Although knowledge of inconsistency in prior testimony cannot be used directly to impeach, it may cause the prosecution to investigate the truthfulness of prior testimony and aid in the generation of independent evidence proving the perjury.[127]

Because of these potentially undetectable nonevidentiary abuses of compelled testimony, Oregon has rejected the *Kastigar* rule. In *State v. Soriano,*[128] the Oregon Court of Appeals held that "[t]he citizens of Oregon are entitled, under their constitution, not merely to a 'substantial' substitute for their constitutional rights, but to one which has 'the same extent in scope and effect.' Mere use and derivative use immunity falls short of that constitutionally-required minimum."[129]

The *Soriano* court noted that even the most conscientious prosecutor would be unable to avoid allowing the knowledge that the witness had admitted the crime in his immunized testimony to affect his handling of the case. It analogized immunized testimony to a deposition which allows the prosecutor to learn the witness's complete story

122. *See* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 45 (3d Cir. 1971) (Seitz, C.J., concurring), *rev'd,* Elias v. Catena, 406 U.S. 952 (1972).

123. 519 P.2d 774 (Alaska 1974).

124. *Id.* at 785-87; *see infra* notes 142-79 and accompanying text.

125. Kastigar v. United States, 406 U.S. 441, 460 (1972).

126. Strachan, *supra* note 118, at 809.

127. *Id.* at 809-10.

128. 68 Or. App. 642, 684 P.2d 1220, *aff'd,* 298 Or. 392, 693 P.2d 26 (1984).

129. *Id.* at 662, 684 P.2d at 1232-33 (footnotes omitted).

before trial. Acknowledging the possible nonevidentiary uses of such knowledge, the court observed:

> A prosecutor may use immunized testimony in any of these ways without introducing it or its fruits into evidence, but it is obvious that none of these actions would be possible if the witness had simply asserted the right to remain silent and had not testified. The witness is thus more subject to prosecution and conviction because of the testimony.[130]

The court then concluded that " '[i]t is unrealistic to give a dog a bone and to expect him not to chew on it.' . . . We hold that Article I, section 12 of the Oregon Constitution forbids giving the dog the bone. Only transactional immunity is constitutional in Oregon."[131]

Behind the pragmatic concerns outlined above lie the policies underlying the privilege — policies that are defeated when a witness faces a grant of immunity and order to testify without the assurance that compliance will in no way adversely affect his penal interests. It is no easy task to sum up these policies. As Justice Frankfurter observed, "The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.' "[132] In *Murphy v. Waterfront,*[133] however, Justice Goldberg identified some of the values underlying the privilege:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuse; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while

130. *Id.* at 663, 684 P.2d at 1233.

131. *Id.* at 665, 684 P.2d at 1234 (quoting State *ex rel.* Johnson v. Woodrich, 279 Or. 31, 36, 566 P.2d 859, 861 (1977)).

Oregon criminal law and procedure decisions have always been particularly persuasive authority in Alaska. Prior to adoption of the state's new criminal code in 1980, Alaska criminal law consisted primarily of an adoption of the Oregon criminal code. Revision of the Alaska criminal code began in the mid 1970's, spurred in part by recent criminal code revisions in Oregon and New York. The Alaska code revision commission examined the revised codes of 40 states, and drew most heavily from the revised Oregon statutes in drafting proposed revised code sections. *See* Stern, *The Proposed Alaska Revised Criminal Code,* 7 U.C.L.A.-ALASKA L. REV. 1, 4 (1977).

132. Ullman v. United States, 350 U.S. 422, 438 (1956) (citations omitted); *accord* Piccirillo v. New York, 400 U.S. 548, 565-66 (1971) (Brennan, J., dissenting from dismissal of writ of certiorari).

133. 378 U.S. 52 (1964).

> sometimes "a shelter to the guilty," is often "a protection to the innocent."[134]

These policies become meaningless when any vestige of incriminatory effect, or even perception of potential incriminatory effect, threatens a witness whose testimony is compelled. The mere perception that one's words may be used against one is as great an evil as the fact. Use and derivative use immunity does nothing to free a witness from the trauma of self-accusation, perjury or contempt.[135] It cannot realistically be said that a witness who realizes that he faces potential prosecution could confess to wrongdoing without the fear of subjecting himself to punishment. Yet, only two other alternatives exist. The witness may stand silent and be held in contempt, or perjure himself. Both "alternatives" carry severe penalties.[136]

In addition, a grant of less than transactional immunity seriously undermines the privilege's role in maintaining the value of our adversarial process.[137] One purpose of the adversarial system is to derive the truth from the confrontation of opposing points of view. The adversarial model recognizes that the effectiveness of this process is undercut whenever one side is compelled to further the cause of the other. One called upon to make his opponent's case is likely to present a distorted view of the truth, or less than the whole truth. Thus, the compulsion of testimony at a point in which the witness still views himself in an adversarial posture typically hinders rather than helps the truth-finding process. Another purpose of the adversarial system is to attempt to equalize the imbalance present when the state, with all its resources, brings an action against an individual. This balance is upset, and the burden of proof effectively altered, when one facing the possibility of prosecution is compelled to speak.

2. *The Alaska Constitutional Protection Against Self-Incrimination Has Been Broadly Interpreted.* The Alaska Supreme Court has never hesitated to find that the protections of the Alaska Constitution exceed in scope those of the United States Constitution.[138] Moreover, the

134. *Id.* at 55 (citations omitted).

135. *See supra* notes 73-75 and accompanying text.

136. *See* ALASKA STAT. §§ 11.56.200, 12.80.010 (1984).

137. *Cf.* Mendelson, *Self-Incrimination in American and French Law,* 19 CRIM. L. BULL. 34 (1983) (discussing the concept of self-incrimination under the French inquisitorial system of criminal prosecution).

138. *See, e.g.,* Stephan v. State, 711 P.2d 1156 (Alaska 1985) (electronic recording of suspect interrogations required under state due process right when interrogation occurs in a place of detention and recording is feasible); State v. Glass, 583 P.2d 872, 876 n.12 (Alaska 1978), *modified by* Juneau v. Quinto, 684 P.2d 127 (Alaska 1984) (warrant requirement applied, under Alaska Constitution's right to privacy, to electronic monitoring of a police informant's conversations with a suspect, though federal Constitution does not require as much); Woods & Rohde, Inc. v. State, 565 P.2d 138

Alaska Supreme Court's decisions specifically related to issues of testimonial immunity suggest that the court will eventually hold that the Alaska Constitution's protection against self-incrimination exceeds in scope the protection of the United States Constitution and requires a grant of transactional immunity in order to compel testimony.

Although *McCracken v. Corey,*[139] *Surina v. Buckalew,*[140] and *State v. Serdahely*[141] were not decided on constitutional grounds, they all express the Alaska Supreme Court's view that the privilege against self-incrimination ought to be interpreted broadly. Given that use and derivative use is regarded as the minimum grant of immunity acceptable under the United States Constitution, these three cases support the proposition that the Alaska Constitution's protection against self-incrimination mandates the more expansive award of transactional immunity.

In *Scott v. State,*[142] the Alaska Supreme Court decided that the scope of the Alaska privilege against self-incrimination exceeds that of

---

(Alaska 1977) (Alaska constitutional prohibition against warrantless administrative inspections of business premises broader than federal prohibition); Blue v. State, 558 P.2d 636 (Alaska 1977) (Alaska constitutional right to counsel at preindictment lineup); Zehrung v. State, 569 P.2d 189 (1977), *opinion on rehearing,* 573 P.2d 858 (Alaska 1978) (search incident to arrest exception to warrant requirement narrower under Alaska Constitution than under federal Constitution); Coleman v. State, 553 P.2d 40 (Alaska 1976) (higher standard for investigative stop by police under Alaska Constitution than under federal Constitution); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) (Alaska equal protection test more demanding than federal test); Ravin v. State, 537 P.2d 494 (Alaska 1975) (Alaska constitutional right to privacy protects personal consumption of marijuana in one's home); Scott v. State, 519 P.2d 774 (Alaska 1974) (privilege against compelled self-incrimination under Alaska Constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings); R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (Alaska constitutional requirement of jury trial in juvenile delinquency proceedings); Baker v. Fairbanks, 471 P.2d 386 (Alaska 1970) (right to jury trial broader under Alaska Constitution than under United States Constitution); Best v. Anchorage, 712 P.2d 892 (Alaska Ct. App. 1985) (Alaska due process right exceeds due process right under United States Constitution in requiring preservation of breath sample during administration of breath alcohol analysis test to persons charged with driving while intoxicated).

139. 612 P.2d 990 (Alaska 1980), discussed *supra* notes 80-93 and accompanying text.

140. 629 P.2d 969 (Alaska 1981), discussed *supra* notes 94-102 and accompanying text.

141. 635 P.2d 1182 (Alaska 1981), discussed *supra* notes 103-08 and accompanying text.

In *Serdahely,* the court adopted not only Uniform Rule of Criminal Procedure 732, but the commentary to the rule as well. To accept the reasoning expressed in the commentary is to reject the constitutionality of any grant of immunity short of transactional immunity, since the commentary finds use and derivative use immunity to be an inadequate substitute for the privilege against self-incrimination. UNIF. R. CRIM. P. 732, 10 U.L.A. 340 (1974), commentary at 40-53.

142. 519 P.2d 774 (Alaska 1974).

its federal counterpart in the context of prosecutorial discovery. Scott was charged with rape. The state sought and obtained from the superior court an order requiring the defendant to disclose the following: (1) the names and addresses of all prospective defense witnesses other than himself; (2) any written or recorded statements in the defendant's possession made by prospective witnesses, excluding the defendant himself; and (3) any alibi defense the defendant intended to raise, together with information indicating the place or places the defendant would claim to have been and the names of witnesses upon whom he intended to rely in asserting that defense. On review in the Alaska Supreme Court the defendant asserted, *inter alia,* that the court's order infringed upon his privilege against compulsory self-incrimination.[143]

The *Scott* court began by analyzing "the historical development of criminal discovery in the context of the privilege against self-incrimination under the fifth amendment to the United States Constitution."[144] First, it recognized that prosecutorial discovery was strongly condemned in early American jurisprudence, as reflected in an 1886 United States Supreme Court opinion:

> [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.[145]

Next, the *Scott* court noted some developments in the scope of prosecutorial discovery. For example, the court observed that in the 1960's some cases and commentary took the view that prosecutorial discovery should be more of a *two-way street,* and that the privilege against self-incrimination was not violated by requiring the defendant to disclose the names of witnesses to be relied upon in advancing an affirmative defense.[146]

---

143. *Id.* at 775-76. The defendant also argued that Alaska Rule of Criminal Procedure 16(c), pertaining to discovery, by its language precluded the court's order, and that the court's order was violative of his right to effective confrontation and cross-examination. *Id.* The court rejected the Rule 16(c) argument. *Id.* at 776-77. The court did not reach the confrontation argument.

144. 519 P.2d at 778.

145. *Id.* (quoting Boyd v. United States, 116 U.S. 616, 631-32 (1886) (footnote omitted)).

146. In this regard, the *Scott* court examined Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962) (favoring broad prosecutorial discovery), *overruled by* Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), and Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U. L. REV. 228 (1964). The *Scott* court also noted that in Prudhomme v. Superior Court, 2

In the third stage of its historical analysis, the court discussed *Williams v. Florida,*[147] a decision in which the United States Supreme Court upheld the right of the prosecution, pursuant to a state rule of criminal procedure, to obtain in advance of trial the names of witnesses and the location of the defendant's alibi, the defendant's claim of the privilege against self-incrimination notwithstanding.[148] The gravamen of the *Williams* decision was that "[h]owever 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments."[149] The *Williams* majority had reasoned that the requirement was merely a matter of timing, regulating when, but not whether, a defendant would disclose information.

Finally, the *Scott* court conceded that most courts considering the issue had upheld similar prosecutorial discovery provisions.[150] However, the Alaska court opined that other courts had not directly confronted the self-incrimination impact of compelled pretrial disclosure.[151] The court noted that one court which had more directly confronted this issue had concluded that "while much of the statute requiring a defendant to make a pretrial disclosure of his defense and his witnesses may not on its face be unconstitutional, the use or application of the statute may lead to an unconstitutional result."[152]

After conducting its historical analysis, the *Scott* court noted its responsibility to develop rights and privileges under the Alaska constitution instead of merely relying on the pronouncements of the United States Supreme Court. To fulfill its responsibilities, the court rejected the majority position in *Williams* and declared that it was "not bound to follow blindly a federal constitutional construction of a fundamental principle if [it was] convinced that the result is based on unsound reason or logic."[153] The Alaska Supreme Court then accepted the reasoning articulated by Justice Black in his *Williams* dissent. Justice Black had characterized the majority's decision as "a radical and dan-

---

Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), the California Supreme Court had retreated from the position it had taken in *Jones.*

147. 399 U.S. 78 (1970).

148. *Id.*

149. *Id.* at 84. For a good criticism of the *Williams* decision, see Blumenson, *Constitutional Limits on Prosecutorial Discovery,* 18 HARV. C.R.-C.L. L. REV. 123 (1983).

150. *Scott,* 519 P.2d at 782.

151. The *Scott* court noted that "[a]lmost without exception provisions of this type have been upheld. Some of the decisions would seem to apply notice-of-alibi provisions without discussing the constitutional considerations. Still other decisions do not extensively discuss or analyze the constitutional problems but subordinate the issue to matters of procedure." *Id.* (citations omitted).

152. *Id.* at 783 (discussing Sikora v. District Court, 154 Mont. 241, 462 P.2d 897 (1969)).

153. *Id.*

gerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself."[154]

The *Scott* court principally objected to *Williams* on the ground that it upset the appropriate adversarial balance in the criminal proceedings.[155] In this regard, the court criticized two rationales advanced in support of broad prosecutorial discovery: (1) the "timing" rationale,[156] and (2) the "two-way street" rationale.[157]

The "timing" and the "two-way street" rationales were first articulated by Justice Traynor in *Jones v. Superior Court.*[158] Under the "timing" rationale, any information that a defendant will *necessarily* disclose at trial, may be the subject of a compulsory pretrial discovery order.[159] Proponents of this rationale posit that such an order merely accelerates the timing of the disclosure in order to increase the effectiveness of the criminal justice system.[160] According to the "two-way street" rationale, a defendant has no valid interest in denying pretrial access to pertinent information absent the proper invocation of a privilege provided by law.[161] Supporters of this view argue that if defendants are to be permitted to discover evidence in the hands of the prosecutor despite the fact that such discovery is not constitutionally mandated, the prosecutor ought to be granted the same right. Only then will the orderly ascertainment of the truth be facilitated.[162]

The *Williams* Court relied on the "timing" rationale. But for the difference in timing, the *Williams* majority equated the defendant's at-trial choice of whether to reveal potentially incriminating information and forego the opportunity to present a defense with the parallel choice before trial.[163] The *Scott* court, however, believed that more than mere timing was at stake in such cases:

> [B]ecause of the prosecutor's heavy burden of proof, the defendant is best advised not to open up any source of potentially adverse information unless he feels that the state has in all likelihood proved

154. *Id.* at 781-82 (quoting *Williams,* 399 U.S. at 107-08 (Black, J., dissenting)).

155. *See Id.* at 784.

156. *See id.* at 783-84.

157. *See id.* at 784-85.

158. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

159. *See id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882; Developments, *Prosecution Entitled to Know Identity of Defendant's Witnesses and Discover Documents to Be Introduced in Support of Affirmative Defense,* 63 COLUM. L. REV. 361, 364-65 (1963).

160. *See, e.g., Williams,* 399 U.S. at 85; *Jones,* 58 Cal. 2d at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

161. *See Jones,* 58 Cal. 2d at 59-60, 372 P.2d at 921, 22 Cal. Rptr. at 881; Developments, *supra* note 159, at 364-65.

162. *See Jones,* 58 Cal. 2d at 59-60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

163. *Williams,* 399 U.S. at 84-85.

> its case; and it is only after the prosecutor has presented his evidence in court that the defendant can adequately make this judgment. By contrast, there is no way the defendant can know before trial the actual strength of the evidence against him as it will appear to the trier of fact, even if he has himself benefitted from extensive discovery; witnesses' testimony under oath and cross-examination may radically depart from their versions of the events as given to the police or defense counsel prior to trial.[164]

Like the *Williams* Court, the *Scott* court recognized the value of avoiding surprise to the prosecution.[165] The *Scott* court impliedly acknowledged that surprise often leads to a stay in the trial for prosecutorial discovery and thereby decreases the efficiency of the law enforcement process.[166] It stated in response, however, that "the appropriate constitutional analysis is not the mere balancing of the state's interest in facilitating efficient law enforcement with the interest of the citizenry in maintaining maximum liberty."[167] To this effect, the court quoted Justice Black's dissent in *Williams*:

> A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. The task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted.[168]

While the *Williams* Court did not rely upon the "two-way street" rationale, the frequency with which other courts and commentators discussed this rationale prompted the *Scott* court to address it.[169] The *Scott* court found the "two-way street" rationale unpersuasive in criminal cases for two very important reasons. First, in criminal proceedings, the investigative resources of the state typically substantially exceed those of the accused.[170] Second, the accused possesses a constitutional right to stand silent in criminal cases while the state attempts to prove its case beyond a reasonable doubt.[171]

In considering whether a particular portion of the compelled disclosure order undermined the defendant's privilege against self-incrimination, the *Scott* court applied the following three-part test to each

---

164. *Scott,* 519 P.2d at 784 (quoting Note, *Prosecutorial Discovery Under Proposed Rule 16,* 85 HARV. L. REV. 994, 1007-08 (1972) (footnote omitted)).

165. *Id.* at 783.

166. *See id.*

167. *Id.* at 784.

168. *Id.* (quoting *Williams,* 399 U.S. at 113-14 (Black, J., dissenting)).

169. *Id.* at 780.

170. *Id.* at 784.

171. *Id.* at 784-85.

portion of the order: (1) was the evidence sought testimonial; (2) was the evidence potentially incriminating; and (3) was the disclosure of the evidence compelled.[172] Under this test, the court approved only that portion of the order requiring the defendant to give notice of intent to assert an alibi defense. The remaining portions of the order were labelled unconstitutional.[173]

Because the compulsion of testimony under a grant of immunity obviously involves compulsion and testimony, only the "incriminating" branch of the *Scott* test requires examination in the context of testimonial immunity. In this regard, it is important to note that the *Scott* court took an extremely broad view of the types of harm to the defendant that it would consider "incriminating." The court concluded that disclosure of certain information not in and of itself incriminating can lead to an incriminating result.[174]

Using this broad approach, the court held that to require the defense to produce a witness list may in some instances tend to be incriminating. The court stated:

> Although the list might not appear to be incriminating on its face, certain of the persons identified in such a list may be known felons, perjurers, accomplices, codefendants, or individuals under suspicion or police surveillance. Moreover, the police may possess additional incriminating information about some of the witnesses and an accused's reference to such persons may tend to arouse suspicion about his relationship with the witness or may tend to implicate him in the criminal activities of such witness.[175]

The court also found that requiring the defendant to disclose written or recorded statements of prospective defense or government witnesses would violate the privilege, since it was not "inconceivable" that some portion of the statements might be incriminating.

> For example, if a defendant in a murder case intended to call witness A to testify that defendant killed in self-defense, pre-trial disclosure of that information could provide the prosecution with its sole eyewitness to defendant's homicide. Similarly, consider the effect of disclosing the name or expected testimony of witness B, whom defendant intends to call only as a "last resort" to testify that defendant only committed a lesser-included offense.[176]

Finally, the *Scott* court found that compelled disclosure of the location of an alibi ran afoul of the privilege, since such information could influence the preparation of the prosecution's case. A pretrial disclosure of the location where the defendant claims to have been at the time the

172. *Id.* at 785.
173. *Id.* at 785-87.
174. *Id.* at 785.
175. *Id.*
176. *Id.* at 786 (quoting Prudhomme v. Superior Court, 2 Cal. 3d 320, 323, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970)).

offense was committed, whether made in the course of discovery as in *Scott,* or in the course of compelled immunized testimony, will certainly lead the prosecution to investigate that location. It may also lead to witnesses able to provide the police with information that might not have been discovered but for the compelled disclosure.[177]

The *Scott* decision reflects the Alaska Supreme Court's determination that the privilege against self-incrimination provided by article I, section 9, of the Alaska Constitution is broader than that afforded by the United States Constitution. It indicates that the court firmly refuses "to exchange a fundamental constitutional right for expediency,"[178] requiring instead that the prosecution live within the bounds placed upon it by traditional American jurisprudence.[179] Just as the Alaska Supreme Court in *Scott* stood fast against a trend towards making criminal discovery a two-way street, it should stand firm against major change in the prosecutorial and defense roles permitted by the new use and derivative use immunity statute.

The *Scott* court's broad approach to what is "incriminating" in the context of criminal discovery should be applied in the context of compelled immunized testimony. While use and derivative use immunity theoretically protects a witness from incrimination, the practical effect of the disclosure of self-incriminatory facts must be considered. The court in *Scott* refused to ignore even those very indirect and remotely incriminating results of disclosures by the defendant. When faced with the issue of whether use and derivative use immunity actually removes the "incriminating" element of compelled testimony, the court should take as skeptical an approach.

3. *Interpreting the Alaska Constitutional Privilege Against Self-Incrimination to Require Transactional Immunity is Consistent with the Intent of the Drafters of the Alaska Constitution.* For historical reasons, it is clear that interpreting the Alaska constitutional privilege against self-incrimination to require transactional immunity is consistent with the intent of the drafters of the Alaska Constitution. Adhering to the intent of the drafters of the Hawaii Constitution is one of the reasons that Hawaii, granted statehood the same year as Alaska, has rejected the *Kastigar* rule.[180]

177. *Id.* at 787.

178. *Id.*

179. A comparison between the Alaska criminal discovery rule and the federal criminal discovery rule reveals the same difference in approach. The Alaska rule, as consistently applied by the state appellate courts, provides for broad discovery of information in the possession of the prosecution, and does not make that discovery contingent on reciprocal discovery provided by the defendant to the prosecution. *Compare* ALASKA R. CRIM. P. 16 *with* FED. R. CRIM. P. 16.

180. *See* State v. Miyasaki, 62 Haw. 269, 614 P.2d 915 (1980).

In *State v. Miyasaki,*[181] the Hawaii Supreme Court rejected a use and derivative use immunity statute[182] as unconstitutional under the Hawaii Constitution.[183] The prosecution sought to compel the testimony of a witness granted use and derivative use immunity pursuant to the statute. The defendant contended that the statute was constitutionally invalid because it was not coterminous with the privilege against self-incrimination bestowed by the Hawaii Constitution. The Hawaii Supreme Court agreed. After reviewing the history of case precedents from *Counselman* to *Kastigar,* the Hawaii Supreme Court concluded that it was "irrefutable" that "transactional immunity was 'part of [the United States'] constitutional fabric,' " almost without question until *Kastigar.*[184] In construing the self-incrimination clause of Hawaii's constitution, the *Miyasaki* court attempted to "give effect to the intention of the framers and the people adopting [the state constitution]."[185] Thus, the court analyzed:

> Here, the definitive interpretation on the Fifth Amendment and immunity, announced in *Brown v. Walker* and followed without question for more than seven decades, prevailing when the Hawaii Constitution was drafted and adopted lends substantial support for a conclusion that the statutory protection afforded by HRS § 621C-3 is inadequate to terminate the constitutionally endowed privilege against self-incrimination. . . . That *transactional* immunity had been "part of our constitutional fabric" from 1893 could not have been lost to a convention that included lawyers among its members. Nor can we conclude the sanguine statements about the Fifth Amendment and interpretations strongly favoring the privilege may have escaped the members of a constitutional convention convened in 1950. *Transactional* immunity is undoubtedly part of the "fabric" of Article I, Section 10 [sic], notwithstanding the tear in the "fabric" of the Federal Constitution caused by *Kastigar* and *Zicarelli.*[186]

The decision of the Hawaii Supreme Court in *Miyasaki* is of particular importance in predicting Alaska's ultimate resolution of this issue since Hawaii and Alaska adopted and ratified their state constitutions virtually contemporaneously. The Alaska Constitution's self-incrimination provision, like its Hawaii counterpart, was enacted at a

---

181. *Id.*

182. HAW. REV. STAT. § 621C-3 (1971) (standard *Kastigar* use and derivative use immunity statute).

183. The privilege against self-incrimination is found in HAW. CONST. art I, § 8.

184. *Miyasaki,* 62 Haw. at 278, 614 P.2d at 921.

185. *Id.* at 281, 614 P.2d at 922 (quoting HGEA v. County of Maui, 59 Haw. 65, 80-81, 576 P.2d 1029, 1039 (1978)).

186. *Id.* at 282, 614 P.2d at 922-23 (emphasis in original) (footnote omitted) (reference to article I, section 10 should be article I, section 8). In Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), a companion case to *Kastigar,* the Court upheld a New Jersey use and derivative use immunity statute.

time when the insufficiency of use and derivative use immunity had been part of the federal "constitutional fabric" for decades. The Alaska constitutional framers, like those in Hawaii, included lawyers mindful of the constitutional limitations on immunity and self-incrimination then in effect. It was the 1958 view, embodied in the decisions of *Counselman* and *Brown,* that necessarily influenced the Alaska constitutional framers.[187] No other view existed at the time and nothing in the preceding decades of case law would have predicted the *Kastigar* analysis. The fact that all of the immunity statutes passed by the Alaska Territorial Legislature before and during the drafting of the state constitution provided for full transactional immunity[188] reinforces the conclusion that, in the minds of the state constitution's drafters, only transactional immunity could supplant the privilege against self-incrimination.

4. *The Alaska Constitutional Right to Privacy.* The federal constitution protects the right to privacy through a broad reading of the due process clause of the fourteenth amendment, or through "emanations" from other constitutional provisions. In contrast, the right to privacy in Alaska is guaranteed by an explicit constitutional provision.[189] Article I, section 22, of the Alaska Constitution provides, in part:

> *Right of Privacy.* The right of the people to privacy is recognized and shall not be infringed.

The state right to privacy has consistently been held to exceed that guaranteed under the federal constitution.[190] The additional protection afforded by this section of the Alaska Constitution is taken quite seriously. For instance, this provision protects the right of adults to possess marijuana at home for personal use.[191] The right of privacy has also been applied so as to amplify the effect of other constitutional rights directed towards the protection of privacy. For instance, the Alaska constitutional guarantee against unreasonable searches and seizures is considered broader in scope than fourth amendment guarantees under the federal constitution, in part because of the broad Alaska constitutional right to privacy.[192] In accordance with this approach, the Alaska Constitution, unlike the federal constitution, pro-

187. *See supra* notes 46-54 and accompanying text.

188. *See supra* notes 76-79 and accompanying text.

189. Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469 (Alaska 1977). For a discussion of the Alaska right to privacy, see Note, *Alaska's Right to Privacy Ten Years After* Ravin v. State: *Developing a Jurisprudence of Privacy,* 2 ALASKA L. REV. 159 (1985).

190. State v. Daniel, 589 P.2d 408 (Alaska 1979); State v. Glass, 583 P.2d 872 (Alaska 1978); Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977).

191. Ravin v. State, 537 P.2d 495 (Alaska 1975).

192. Reeves v. State, 599 P.2d 727, 734 (Alaska 1979).

hibits warrantless administrative inspections of private business premises.[193] The warrantless monitoring of private conversations on the consent of one participant, acceptable under federal constitutional standards, constitutes an unreasonable search and seizure pursuant to the combined effect of the Alaska constitutional prohibition against unreasonable searches and seizures, and the Alaska constitutional right of privacy.[194]

The privilege against self-incrimination reflects "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' "[195] Just as the Alaska constitutional right to privacy has been applied to amplify the effect of the guarantee against unreasonable searches and seizures, it may be applied to further support a broader application of the privilege against self-incrimination than is utilized in the federal system.

### B. The Immunity Statute Was Enacted in Violation of the Alaska Constitution's Grant of Rule-Making Authority to the Supreme Court

Taken together, the Alaska Constitution,[196] the Alaska Rules of Court Procedure and Administration,[197] the Uniform Rules of the Alaska Legislature,[198] and Alaska decisional law[199] provide that a leg-

193. Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977).

194. Coffey v. State, 585 P.2d 514 (Alaska 1978); Aldridge v. State, 584 P.2d 1105 (Alaska 1978); State v. Glass, 583 P.2d 872 (Alaska 1978).

195. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

196. ALASKA CONST. art. IV, § 15 provides in full:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

197. ALASKA R. CIV. P. 93 provides:

> These rules are promulgated pursuant to constitutional authority granting rule making power to the supreme court, and to the extent that they are inconsistent with any procedural provisions of any statute not enacted for the specific purpose of changing a rule, shall supersede such statute to the extent of such inconsistency.

198. UNIF. R. ALASKA LEGIS. 39(e) provides:

> If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted

islative enactment cannot override a preexisting Alaska Supreme Court rule unless (1) the legislature specifically identified the enactment as changing the court rule, (2) the enactment was subjected to a separate vote, and (3) the enactment was approved by a two-thirds majority in both houses of the legislature.

Although the Alaska Supreme Court had not *technically* enacted a numbered rule requiring transactional immunity when the legislature passed the use and derivative use immunity statute at issue, the court had effectively done so. In *State v. Serdahely,*[200] the supreme court explicitly adopted transactional immunity as a "rule of practice"[201] after carefully considering those policies and procedures that Alaska should follow. This "rule of practice" was adopted by a unanimous court[202] pursuant to the vote gathering process ordinarily followed for the promulgation of civil and criminal rules. For all intents and purposes, the "rule of practice" requiring transactional immunity constituted a "Rule of Court." There is no logical or practical distinction between enacting a rule of practice or procedure by a process of codification (insertion of the rule in the volumes of the Rules of Court) or by a process of decisional law. The legislature was constitutionally required to adhere to the requirements for overriding a supreme court rule in its passage of the use and derivative use immunity statute.

The Alaska Legislature failed to meet any of the strictures imposed by the Alaska Constitution, Alaska Rules of Court, the Uniform Rules of the Alaska Legislature, and Alaska decisional law in enacting the use immunity statute. The provision was not singled out for separate consideration,[203] was not identified as causing a change in court rules,[204] and was not approved by a two-thirds majority in each house of the legislature.[205] The manner in which the legislature en-

---

from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

199. *See* Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963) (required that the enactment specifically state that its purpose is to effect a change in court rules).

200. 635 P.2d 1182 (Alaska 1981).

201. *Id.*

202. With the exception of the addition of Justice Allen Compton to and the deletion of Justice Roger Connor from the supreme court bench, the Alaska Supreme Court is composed today of the same members as the court that decided *Serdahely.* The likelihood of Justice Compton concurring with the court's preference for transactional immunity may be fairly assumed from his decision, as a superior court judge, in *State v. Compton,* 629 P.2d 969 (Alaska 1981). As a result, there is little basis to conclude that a rule on immunity adopted by the court today would be anything other than a codification of the rule adopted in *Serdahely.*

203. *See* 1982 ALASKA HOUSE J. at 2315-16. *See also* letter from Governor Jay Hammond to Senate President Jalmar Kerttula, 1982 ALASKA SENATE J. at 1787-88 (July 22, 1982).

204. *See* 1982 ALASKA HOUSE J. at 2314-15; 1982 ALASKA SENATE J. at 1704.

205. The provision passed in the house by a vote of 22-17-01, 1982 ALASKA

acted the statute thus renders it inadequate to override the supreme court's adoption in *Serdahely* of transactional immunity as a "rule of practice" in Alaska.[206]

## VI. CONCLUSION

If the Alaska Legislature fails to cure the defects that plague the use and derivative use immunity statute, it is likely that the Alaska Supreme Court will ultimately hold the statute invalid. Having expressed a strong and unanimous preference for transactional immunity as a matter of judicial policy, it seems unlikely that the court will defer to a legislative determination that fails to comport with the procedural requirements of the Alaska Constitution, the Rules of Court, and the Uniform Rules of the Alaska Legislature.

Even if the legislature cures the procedural problems associated with the use and derivative use immunity statute, it appears likely that the Alaska Supreme Court will ultimately reject the statute when unavoidably faced with the issue of the constitutionality of use and derivative use immunity. *Kastigar* represents an anomaly in the case law. The *Kastigar* analysis conflicts with the view of the breadth of the Alaska Constitution's protection from self-incrimination expressed in *Scott v. State,*[207] and with the view of immunity expressed in *State v. Serdahely,*[208] *Surina v. Buckalew,*[209] and *McCracken v. Corey.*[210] Perhaps most importantly, *Kastigar* is inconsistent with the concept of the privilege against self-incrimination in the minds of the framers of the Alaska Constitution.

The objection of prosecutors to affording transactional immunity to witnesses is rooted in the belief that transactional immunity poten-

---

HOUSE J. at 2314-15, and in the senate by a vote of 13-06-01, 1982 ALASKA SENATE J. at 1704.

206. At least three Superior Court Judges have addressed the constitutionality of ALASKA STAT. § 12.50.01. Superior Court Judge Charles K. Cranston upheld the statute against a challenge based on the rule making powers of the supreme court. Judge Cranston concluded that the *Serdahely* court relied upon its supervisory powers, not its constitutional rule making authority, in adopting transactional immunity. State v. Buttacavoli, 3KN S85-1358 (Opinion of Judge Charles K. Cranston, Nov. 15, 1985) (unpublished). Superior Court Judge Rene J. Gonzalez reached the opposite conclusion in State v. Gearhart, 3AN S85-7469 Cr. at 5-7 (transcript of Trial by Jury, Aug. 14, 1986). Most recently, Superior Court Judge Mary E. Greene found that only transactional immunity would be sufficient to satisfy the Alaska constitutional privilege against self-incrimination. Judge Greene did not, however, address the procedural argument. State v. Mackay, 3AN S85-7630 Cr. (Opinion of Judge Mary E. Greene, Sept. 22, 1986).

207. 519 P.2d 774 (Alaska 1974).

208. 635 P.2d 1182 (Alaska 1981).

209. 629 P.2d 969 (Alaska 1981).

210. 612 P.2d 990 (Alaska 1980).

tially requires the state to elect between defendants and to set one or more of them free. Prosecutors advance the argument that the court should balance the privilege against self-accusation with the state's perceived need or desire to prosecute all persons for all things. There are several disturbing elements to this view. First, such a contention presumes the guilt, rather than the innocence, of individuals. Second, the contention mistakenly assumes that a goal of prosecution and conviction pervades American jurisprudence. It does not. Paramount in our system of justice are those rights secured and guaranteed by the Constitution, not the prosecution of wrongdoing. It would be easy to cast a net so broad as to ensnare all persons guilty of all wrongdoing. Unfortunately, when the net is cast so broadly, it inevitably ensnares the innocent as well as the guilty.

While the majority decision in *Kastigar* may have been a disappointment to the dissenting justices, the result should not have been surprising in light of the reconstruction of the United States Supreme Court which occurred subsequent to 1968.[211] It is difficult to avoid the conclusion, however, that *Kastigar* is "against" the weight and alignment of history and precedents on the issue of the scope of the fifth amendment privilege and the scope of immunity necessary to supplant the privilege. The Alaska Supreme Court will likely elect to keep alive and vital the views of *Kastigar*'s dissenters, and to align itself with Hawaii, Oregon, Massachusetts, and the years of case law that preceded *Kastigar* by rejecting, on state constitutional grounds, Alaska's use and derivative use immunity statute.

211. *See* Dershowitz & Ely, *supra* note 121.